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Redefining consent: rape law reform, reasonable belief, and communicative responsibility

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Abstract
Contemporary trends in rape law reform have resulted in the adoption of more affirmative or communicative conceptions of sexual consent across many jurisdictions. Drawing on empirical research conducted by the author in the wake of the 2019 Gillen Review into serious sexual violence in Northern Ireland and proposed changes to the law on consent, this article illuminates the social and cultural norms that inform and complicate the construction and interpretation of consent models. Three broad themes from the primary data are identified: the law’s (in)ability to capture the complexity of human interactions, societal ambivalence around consent and rape, and consent confusion. The article concludes by introducing and further developing the notion of communicative responsibility and arguing that it should be used as a prism through which to make sense of the enduring challenges in this area of law and human interaction.

1 INTRODUCTION

The advent of global movements such as #MeToo have prompted more victims of sexual violence to speak out and expose the ‘fantastical failure of law’ to adequately capture and adjudicate sexual harms. In light of this, there have been calls for reform to the law on rape across many

1 B. Cossman, ‘#MeToo, Sex Wars 2.0 and the Power of Law’ (2019) 3 The Asian Yearbook of Human Rights and Humanitarian Law 18, at 34.
In those characterized by consent-based definitions of rape, attempts have been made to strengthen consent standards and the requirement that, to avoid liability, the defendant must reasonably, as opposed to honestly, believe that the complainant consented (the ‘reasonable belief threshold’). Take for example New South Wales, where, after the *Lazarus* case – which involved the acquittal of the defendant on appeal because, even though it was accepted that the complainant did not consent, it was found that the defendant believed that she consented – a more robust reasonable belief threshold has been put forward. Similarly, in Northern Ireland, the acquittal of the four defendants, including two Ulster and Ireland rugby players, in the ‘Rugby Rape’ trial led to a re-evaluation of consent laws due to concerns that the cross-examination of the complainant by four different defence barristers amounted to ‘victim blaming’, compared to the limited attention paid to the actions of the defendant who ‘presumed’ that the complainant consented.

Consent, however, is not without critique. Scholars such as MacKinnon have questioned whether it is a ‘meaningful concept’ in the context of unequal power relations between the sexes, and others have suggested that consent, and the focus on the reasonableness of the defendant’s belief in consent, places a disproportionate focus on the complainant’s actions. Nonetheless, as a result of the dominant – though not uncontroversial – conceptualization of rape and other forms of sexual violence as a violation of sexual autonomy, understood as the right to sexual self-determination, consent has taken hold as the dividing line between permissible and impermissible conduct. Key questions have thus arisen around what sexual consent actually is and how the defendant’s mindset should be legally framed. Within this context, there has been a trend towards affirmative or communicative conceptions of consent, premised on ongoing communication between the parties and positive agreement to engage in sexual activity. However, the form that such standards take varies across jurisdictions, meaning that reformers can choose from a range of models, from requiring physical signals of affirmation, to verbal affirmation, to stopping and asking.

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10 For an overview of models, see A. Gruber, ‘Consent Confusion’ (2016) 38 *Cardozo Law Rev.* 415.
Indeed, the existence of these different models has given rise to what Gruber terms ‘consent confusion’, with certain models more ‘sex-regulatory’ than others. Consequently, some have questioned whether rape law reform is being driven by a ‘progressive punitiveness’ and problematically expanding what ‘counts’ as rape. At the same time, however, it has been suggested that some affirmative conceptions of consent are under-inclusive as they fail to take adequate account of context and reinscribe heteronormative sex scripts. In this respect, there have been wide-ranging debates, within and across different disciplines, about sexual communication; how contemporary consent models can be translated into law; the rationale for criminalization, for example, as a means of punishment and/or catalysing cultural and behavioural change in society; and, more philosophically, consent and the nature of ‘good’ or ‘ideal’ sex.

Within this broader context, this article draws on 16 qualitative semi-structured interviews with key professional stakeholders in Northern Ireland to inform the theoretical and critical analysis of contemporary efforts to reform the law on sexual consent. As noted earlier, questions around whether the law on consent is fit for purpose in Northern Ireland arose following the high-profile ‘Rugby Rape’ trial. This nine-week trial concluded in March 2018 with the acquittal of four men for rape, sexual assault, exposure, and perverting the course of justice. A month later, the Northern Ireland Criminal Justice Board commissioned a review of the law and procedures with regards to serious sexual offences in Northern Ireland. The final report of the review, led by Lord Justice Gillen, was published in May 2019 and contained over 200 recommendations, including proposed changes to the substantive definition of consent. The empirical research underpinning this article explored, in particular, the recommendation that the reasonable belief threshold contained in the Sexual Offences (NI) Order 2008 should be reframed, from requiring consideration of any steps taken by the defendant to ascertain consent when assessing reasonableness, to now requiring consideration of the defendant’s failure to take such steps. The article argues that while this

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11 Id., p. 430.
21 Sexual Offences (NI) Order 2008, Art. 5(1)(c) and (2). These mirror Sections 1(c) and (2) of the Sexual Offences Act 2003.
22 Gillen, op. cit., n. 20, p. 377.
reform seeks to shift attention to the actions of the defendant, the manner of its application is not entirely clear and the core controversies that arose under the previous law are likely to endure. In this respect, three broad themes from the qualitative data can be identified: the law’s (in)ability to capture the complexity of human interactions, societal ambivalence around consent and rape, and consent confusion.

The article draws on the notion of ‘communicative responsibility’ from communicology studies, and argues that it should be used as a prism through which to make sense of the enduring challenges in this area of law and human interaction. Communicative responsibility is premised on the idea that individuals make judgements about the extent to which each partner is responsible for creating shared understanding in a communicative event, and that such judgements influence the extent to which the parties rely on inference and implicature. The article thus makes two significant contributions to the theoretical and critical literature on rape and consent. First, it provides new empirical data from a post-conflict jurisdiction characterized by a ‘moral conservatism’ that impacts how issues relating to sex, sexuality, and sexual violence are viewed and conceptualized. Consequently, the article underlines the difficulties associated with legally constructing and interpreting sexual consent and the defendant’s mindset. Second, by engaging with the notion of communicative responsibility, the article advances the interdisciplinary research in this area, thereby enabling more diverse understandings to evolve. While the interview data is drawn from Northern Ireland, the findings have broader resonance for other jurisdictions grappling with law reform to sexual consent standards.

The article begins with an overview of the literature on affirmative or communicative conceptions of consent and situates the proposed reform in Northern Ireland within legal formulations that reflect variations of these models. It then provides a brief summary of the jurisdictional focus of the research and an overview of the methods used to collect the primary data. Next, it presents the findings and themes from the empirical research. Finally, it introduces and develops the notion of communicative responsibility as a means of thinking through the role of communication in sexual relations, which may inform how we approach any expectation of a defendant taking steps to ascertain consent within the context of sexual offences.

2 | AFFIRMATIVE OR COMMUNICATIVE CONSENT IN THEORY AND PRACTICE

The concept of consent within the context of rape and sexual offence laws has long been subject to critique. Though preferable to force-based definitions, consent has been criticized for being a vague concept that, within the context of Northern Ireland and England and Wales for example, covers a range of mindsets, from actual desire to reluctance, compounding the challenges associated with identifying ‘apparent’ or coerced consent. Empirical research from

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23 Id., pp. 368–369.
26 For an evaluation of force- or coercion-based models of rape and consent-based models, see Dowds, op. cit., n. 8.
28 Dowds, op. cit., n. 8, p. 53.
a number of jurisdictions has highlighted narratives of ‘implied’ consent based on the complainant’s behaviour, and continuing reliance on evidence of force and resistance as an indicator of non-consent. Consequently, it has been argued that complainants experience ‘secondary victimisation’ due to their character and credibility being ‘put on trial’, while defendants tend to disappear from view in a way that impedes justice. Within this context, some scholars have recommended removing consent as the key consideration and others have argued that it should be reformulated. In respect of the latter, Cowan has emphasized that

\[\text{consent is a concept which we can fill with either narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to mutuality, embodiment, relational choice, and communication.}\]

As such, many of those in favour of reforming consent have advocated for affirmative or communicative consent standards premised on ongoing, positive communication between sexual partners.

Affirmative or communicative notions of consent have their origins in the work of feminist scholars such as Pineau, who emphasized the mutuality of sexual interactions and the need to engage in conversations about each partner’s sexual desires, and to respect each other’s boundaries. On this view, passivity or a lack of resistance cannot be taken as consent, and the focus is on the presence of affirmation as opposed to refusal. According to Schulhofer, for example, ‘citizens may not presume a privilege to intrude upon the rights of others, but rather must respect the autonomy of each person and stand clear in the absence of a direct, affirmative manifestation of consent’. Monaghan and Mason develop a conception of communicative consent as reliant on two factors: autonomy and epistemic responsibility. According to the former, sexual beings must be taken seriously as authoritative communicators of their own desires, and, according to the latter, sexual partners have a responsibility to know what the other person wants and does


\[35\text{L. Pineau, ‘Date Rape: A Feminist Analysis’ (1989) 8 Law and Philosophy 217.}\]


not want from sex. A variation of the communicative model is the negotiation model advanced by Anderson, who suggests that ‘negotiation would minimally require a request for information about another person’s desires and boundaries or an expression of one’s own desires with an invitation to respond’.

While communication is central to these models, there is considerable variability with respect to how this model can/should be translated into law. For example, in California, consent is defined as ‘positive cooperation in act or attitude pursuant to an exercise of free will’; in Guyana, it is ‘words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or other sexual contact’. Similarly, Iceland requires consent to be ‘freely stated’ and Sweden requires ‘voluntary participation’ with attention to whether voluntariness was expressed through words or actions. Thus, according to these formulations, consent is performative. However, during debates on law reform in other Nordic countries, such as Denmark, in which there was general support for consent-based legislation, concern was raised that communicative formulations could criminalize ‘natural and ordinary’ sexual interactions where consent is not expressed explicitly. Similar concerns are evident in the academic literature, with resistance to overly prescriptive legal formulations that focus on how consent is expressed as opposed to the variety of circumstances within which sexual decision making occurs.

A performative conception of consent also exists in Germany, where sexual acts ‘against the recognizable will of another person’ are prohibited. However, this approach is reminiscent of resistance-based definitions and is thus problematic. In jurisdictions such as Canada, New South Wales, and Scotland, consent is defined as free and/or voluntary agreement. In Northern Ireland and England and Wales, the legislation refers to agreement ‘by choice’ by someone who has the freedom and capacity to make that choice. In respect of the latter jurisdictions, consent is understood as a state of mind, but it has been suggested that a communicative dimension is inserted via the mens rea element that requires consideration of any steps taken by the defendant to ascertain consent when determining whether their belief in the complainant’s consent was

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39 It is acknowledged that there may be different explanations for the variation in approaches linked to the nature of the legal system, local and/or regional activism, key cases highlighting definitional flaws (see for example the cases in New South Wales and Northern Ireland noted above), and the social/cultural context within which reforms are made.
40 Penal Code of California 1872 (amended 2021), s. 261.6.
41 Sexual Offences Act (Act 7 of 2020 Amended by 2 of 2013) Preliminaries.
42 Act on the Amendment of the Criminal Code, No. 19/1940, with Subsequent Changes (Sexual Offences) 2018.
43 Criminal Code (Sweden) Brotsbalk 1962: 700 (amended 2018), ch. 6, s. 1.
44 J. Vestergaard, ‘The Rape Law Revision in Denmark: Consent or Voluntariness as the Key Criterion’ (2020) 8 Bergen J. of Criminal Law and Criminal Justice 5, at 27.
45 For an overview, see Dowds, op. cit., n. 9, pp. 162–173.
46 German Criminal Code 1998, as last amended by Art. 2 of the Act of 19 June 2019, s. 177(1).
47 Criminal Code of Canada 1985, s. 273.1(1); New South Wales Crimes Act 1900, s. 61HE(2); Sexual Offences Act (Scotland) 2009, s. 12.
48 Sexual Offences (Northern Ireland) Order 2008, Art. 3; Sexual Offences Act 2003, s. 74.
49 R v. Olugboja, op. cit., n. 27, 5.
reasonably held. However, there is no obligation on the defendant to take such steps. This is in contrast to Canada and Tasmania, for example, as well as reforms in New South Wales, where a defendant cannot rely on the defence of a mistaken belief in consent where they did not take steps, or say or do anything, to ascertain whether the complainant consented.

In Northern Ireland, many of these models were considered as part of the 2019 Gillen Review of the law and procedure with regards to sexual offences. In relation to the evaluation of the current definition of consent, the Review was guided by two questions: is the definition adequate, and is our understanding of what evidence constitutes reasonable belief on the part of a defendant confused and unclear? In noting that Northern Ireland has ‘correctly’ moved away from force-/resistance-based models, Gillen acknowledged the difficulties with the current consent threshold, as well as the potential of what he termed ‘yes means yes’ models, such as those in California and Sweden. However, he considered such models to be less favourable than the current Northern Ireland position, due to the focus on external manifestations of consent as opposed to whether the complainant, in their mind, consented and raised concern that such an external focus could cause ‘confusion, uncertainty and dispute amongst members of the jury’.

In relation to the reasonable belief threshold, Gillen recognized the move towards requiring that the defendant take steps to ascertain whether the complainant consented if a belief in consent is to be reasonable, but cautioned that this could contravene the right to fair trial by placing the burden of proof on defendants. Nonetheless, he concluded that more could be done to emphasize sexual choice as an underpinning principle of consent and to shift the focus away from the complainant’s behaviour and towards the defendant’s. In this respect, the following recommendations were made: (1) the inclusion of a provision that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent; (2) the expansion of circumstances where there is an absence of consent to include intimidation, coercion, third-party consent, or where the complainant is overcome by alcohol or drugs; (3) the inclusion of a provision permitting consent to be withdrawn at any time; and (4) an amendment to the wording of circumstances that should be considered when determining a reasonable belief in consent so that the jury are asked to consider a failure by the defendant to take steps to ascertain consent.

During the consultation period, the above recommendations were broadly welcomed; however, the Criminal Bar Association (CBA) felt that the existing law was clear and that redefining

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51 Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (2021) ch. 20, p. 17. This compendium is published by the Judicial College in England and Wales but also relied on by the judiciary in Northern Ireland.
52 Criminal Code of Canada 1985, s. 273.2(b); Criminal Code Act 1924 (Tasmania), s. 14A(1)(c).
53 Crimes Legislation Amendment (Sexual Consent Reforms) Bill 2021, s. 61HK(2).
55 Id., p. 359.
57 Id., p. 366.
58 Id., p. 374.
60 Id., p. 377.
consent in a different form of words would be unnecessary and unhelpful. The Attorney General at the time also expressed concern that the recommendation in relation to the reasonable belief threshold could introduce a dangerous artificiality into the jury assessment. Informed by these responses and the broader theoretical and practical context of communicative consent and sexual consent law reform, this study sought to provide a deeper analysis of the Gillen recommendations through qualitative interviews with key stakeholders from within the sexual violence sector in Northern Ireland.

3 | JURISDICTIONAL FOCUS AND METHODOLOGICAL DESIGN

This study is based on research conducted in Northern Ireland between November 2019 and January 2020. Northern Ireland is a devolved, post-conflict jurisdiction, with a criminal justice system that has historically focused on dealing with political violence as opposed to ‘ordinary crimes’, including sexual and gender-based violence. Though progress has been made, relations between the police and some sections of Northern Irish society remain fractured, and particular strains of post-conflict patriarchy, as well as high levels of religiosity, result in an environment of shame and silence around sexual violence. Within this context, Northern Ireland has consistently had the lowest conviction rate for rape across the United Kingdom, sitting at 1.8 per cent in 2019, compared to 3.3 per cent in England and Wales and 5.2 per cent (including attempts) in Scotland. In this regard, the Gillen Review provided the opportunity to address the unique challenges presented within this jurisdiction, as well as those that are also encountered elsewhere, rather than following the blueprint set by England and Wales, as had traditionally been the case.

The data underpinning this article was collected via semi-structured interviews with 16 professionals from within and across the sexual violence sector. Interviewees included police officers (1), members of the judiciary (1), prosecutors (1), defence barristers (2), members from criminal justice oversight agencies (3), health professionals (2), victim/survivor advocates (4), sexual violence educators (1), and government representatives (1) (13 female and three male). Purposive sampling was used when recruiting participants, with individuals chosen on the basis of their expertise in the area of sexual offences.

The study received ethics approval from the research ethics board at Queen’s University Belfast. Guidance and support were offered to participants, with contact information for specialist support organizations provided before and after conducting the interviews. Participants took part on the basis of strict confidentiality and were asked how they would like to be cited when quoted. As Northern Ireland is a small jurisdiction, some participants did not want to be identified by direct profession. Consequently, participants have been grouped by broad profession depending on experience: criminal justice professionals (those working in the administration of criminal justice), sexual violence support professionals (those from the health and victim support sector), and

61 Id., p. 372, fn. 8.
62 Id., p. 373, fn. 10.
64 Killean et al., op. cit., n. 2, pp. 7–8.
65 Gillen, op. cit., n. 20, p. 271.
community stakeholders (those with knowledge of and influence in relation to sexual violence awareness but whose work does not necessitate direct contact with victims or the criminal justice system).

The interview questions were devised following a comprehensive review of the relevant literature. Questions addressed participants’ perceptions of consent in general; their thoughts on the Gillen proposal relating to consent and the reasonable belief threshold; and attitudes towards broader trends in consent reform, such as affirmative or communicative models. Interviewees were informed that they could refuse to answer any questions and/or stop the interview at any point. Interviews lasted between 45 and 90 minutes, and were audio-recorded and transcribed verbatim. Data collected was coded according to the themes identified as part of the analysis. 66

At this juncture, it should be noted that while this article focuses on consent and reasonable belief primarily as they relate to the offence of rape, the discussion is also relevant to other sexual offences where the reasonable belief threshold operates. 67 Further to this, within Northern Ireland, the rape offence requires penile penetration 68 and thus reflects heteronormative conceptions of sexual violence – though males can be victims of this offence. While I do not seek to contribute to the ‘typical scripts’ 69 that exclude the experience of those who suffer abuse outside of heteronormative contexts, many of my interviewees referred to ‘she’/’her’ when discussing the complainant and ‘he’/’him’ when discussing the defendant. As such, this language is reflected in some of the quotes used in this article.

4 | PROFESSIONAL PERSPECTIVES ON REFORM TO CONSENT

Many of the principal debates concerning affirmative or communicative conceptions of consent and law reform as discussed earlier were evident in the interviews. These relate to the perceived unevenness of the current law in terms of attributions of responsibility, 70 the intimate and at times implicit nature of sexual interactions, 71 the role of gendered norms and stereotypes in normalizing sexual violence, 72 the potential for the law to act as a catalyst for social and cultural change, 73 long-standing tensions around the potential for the law to be both over- and under-inclusive, 74 and the difficulties associated with having ‘too much law’ or a ‘legal terrain marked by uncertainty’ due to a lack of specification in relation to what consent or key terms within the definition mean. 75 As

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68 Id., Art. 5(1)(a).
70 See O. Smith and T. Skinner, ‘How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials’ (2017) 26 Social & Legal Studies 441, at 451; Burgin and Flynn, op. cit., n. 7; Monaghan and Mason, op. cit., n. 37.
73 Hörnle, op. cit., n. 17.
75 A. Carline and C. Gunby, “‘How an Ordinary Jury Makes Sense of It Is a Mystery”: Barristers’ Perspectives on Rape, Consent and the Sexual Offences Act 2003’ (2011) 32 Liverpool Law Rev. 237, at 244. See also Gruber, op. cit., n. 10, p. 419.
such, this section is framed around three key themes from the primary data: the law’s (in)ability to capture the complexity of human interactions, societal ambivalence around consent and rape, and consent confusion.

4.1  The complexity of human interactions

Sexual relations and sexual expression have been said to be central to personhood and identity. Indeed, sexual intimacy involves a complex mix of emotions, desires, and vulnerability. Within this context, scholars have drawn attention to the ‘inarticulateness of sex’ due to the predominately non-verbal nature of sexual communication and the way in which ‘the details of desire and satisfaction are often discovered, and produced, in the sexual moment’. In this respect, critical consent scholars have argued that while consent is often the preferred legal tool for distinguishing sex from sexual violation, the focus on ‘getting consent’ relies on sex proceeding in an overly cautious, scripted way. In line with this literature, participants spoke about the complexity and spontaneity of sexual interactions:

It sounds easy, doesn’t it? It’s all right if you … want a drink, yes or no, but whenever it comes to sexual relations, it’s so much more complex, which is why it’s so wonderful whenever it’s done in a consensual and loving environment, because it is more intimate, and subtle, and complex, which is why I think the law struggles with it.

Similarly, some scholars have argued that ‘good’ or ‘ideal’ sex rests not on consent but on mutuality, reciprocity, co-determination, and teamwork that render consent ‘unnecessary’. Such a view was reflected in the responses of some participants, one of whom noted that ‘the nature of sex is that you don’t … it’s meant to be, the whole thing about being … I don’t mean spontaneous, but if sex is consensual for both parties, it should be pretty obvious’. Indeed, it was further suggested that the requirement to consider steps taken by a defendant, or their failure to take steps under Gillen’s proposal, was ‘very clinical and contractual’:

I don’t know what steps you could take because … if you have to take steps to get consent, surely the consent is not really there at all, if that makes sense … If you thought that you needed to take steps to get consent, then you shouldn’t be having sex with that person.

76 Sikka, op. cit., n. 71, p. 30.
78 A. Gruber, ‘Not Affirmative Consent’ (2016) 47 The University of Pacific Law Rev. 683; M. A. Beres, ‘Rethinking the Concept of Consent for Anti-Sexual Violence Activism and Education’ (2014) 24 Feminism & Psychology 373.
79 Interview 4, sexual violence support professional, 21 October 2019.
81 Interview 6, sexual violence support professional, 8 November 2019.
82 Id.
83 Id.
The views expressed above reflect, to a certain degree, an understanding of consent as perhaps ‘too low an expectation’ for our sex lives. Indeed, some feminist scholars have argued that consent as a social and legal construct retains and reinforces the idea of women as property, concerned primarily with the unsanctioned use of the body. In this respect, it has been suggested that consent reduces sex to a transaction in which one party ‘gives’ consent and the other ‘takes’ it. Pineau, for example, described it as the ‘aggressive-acquiescence’ model of seduction, with one party applying pressure and the other ‘going along’ with the sexual encounter. Likewise, Gardner claims that ‘consent presupposes an asymmetry in activity – a doer and a sufferer’. According to these scholars, consent undermines rather than upholds sexual autonomy.

Affirmative or communicative models of consent are supposed to address the imbalance noted above. However, according to Torenz, models that require consent to be expressed and/or the sexual initiator to either ask for consent or take steps to ascertain consent reproduce heteronormative conceptions of male and female sexuality, with men as sexual initiators and women as sexual gatekeepers. Further to this, Gotell has suggested that affirmative standards may produce new sexual subjects who comply with these standards out of fear of criminalization ‘rather than insistence on respect for sexual autonomy or recognition of the harmful consequence of coerced sex’. One participant in the current study raised similar concerns around the move towards a ‘process of consenting’, which becomes dangerous due to the creation of a culture in which consent becomes a tick-box exercise that fails to recognize the fluid nature of sexual interactions and the fact that consent can be withdrawn. This view can, however, be contrasted with that of another participant who explained:

I suppose if you can prove that there was, you know, failure to take any steps that would sound like … ‘Actually I don’t care about consent, I don’t actually want consent, I’m gonna do what I want anyway’ …

On the other hand, one participant felt that affirmative notions of consent could ‘lead to injustice because there may well be lots of cases where women do not express consent but in fact are actively consenting’. Further to this, and building on the perception that consent should be ‘obvious’, it was noted that Gillen’s proposal was simply ‘tweaking things’ and that parties to a sexual encounter may ‘know, or think they know, what each other thinks and maybe they make a mistake – doesn’t mean they’re not reasonable’. Such a view resonates with Gruber’s description of

84 Gardner, op. cit., n. 80, p. 60.
88 Gardner, op. cit., n. 80, p. 48.
89 Torenz, op. cit., n. 14, pp. 724–726.
91 Interview 7, sexual violence support professional, 8 November 2019.
92 Interview 5, community stakeholder, 28 October 2019.
93 Interview 16, criminal justice professional, 8 January 2020.
94 Id.

80 Gardner, op. cit., n. 80, p. 60.
affirmative consent as a ‘juggernaut’\textsuperscript{95} due to the fact that the narrowing of acceptable means of sexual communication may result in the criminalization of morally unproblematic behaviour and ‘ordinary sexual actors’ becoming ‘sacrificial lambs in the larger cultural effort’.\textsuperscript{96}

In this respect, the concept of ‘fairness’ was central to how some criminal justice professionals viewed the reasonable belief threshold, with one suggesting that the current formulation ‘attempts to recognize that it’s not just about whether or not in her mind she consented, it’s also about what was going on in his mind’, but that a reformulation to focus on the defendant’s failure to take steps could lead to ‘injustice’.\textsuperscript{97} By contrast, the views of sexual violence support professionals, frustrated by the difficulties associated with using a ‘blunt instrument like the law to cover human behaviour’,\textsuperscript{98} were framed through a more relational lens. Within this context, various tensions arise around the extent to which the law can objectively assess complex human interactions and the difficulties with ensuring fairness for both the complainant and the defendant. The following section builds on these tensions by engaging with the social context within which determinations of consent and reasonable belief in consent are made.

\subsection{Societal ambivalence around consent and rape}

A significant insight brought by feminist scholarship on rape and sexual violence is that the criminalization of such violence is contingent upon dubious social and cultural norms around acceptable sociosexual behaviour.\textsuperscript{99} Within this context, problematic norms surrounding heterosexual relationships that prescribe men as the sexual initiator and women as the passive recipient collide with stereotypical assumptions around who may be considered an ‘ideal’ victim or perpetrator of rape. Such an ‘ideal’ can be found in what Estrich has termed the ‘real rape’ stereotype, which involves an unknown attacker in an isolated but public location and a victim who was acting ‘respectably’ – that is, not drinking or flirting – and who physically resists the attack.\textsuperscript{100} Where the parties to an alleged rape deviate from this ‘ideal’, it becomes difficult for many to determine the consensual versus non-consensual nature of the interaction, as reflected in the comments of three participants in the study:

\begin{quote}
I think the problem is that we want victims in rape cases and serious sexual offences to be perfect. We want a perfect victim [who] does not exist.\textsuperscript{101}
\end{quote}

\begin{quote}
There is still an expectation that there really should be injuries, they should have fought back as well, but there should have been violence and force for it to have been rape.\textsuperscript{102}
\end{quote}

\textsuperscript{95} Gruber, op. cit., n. 10, p. 419.
\textsuperscript{96} Id., p. 446.
\textsuperscript{97} Interview 16, op. cit., n. 93.
\textsuperscript{98} Interview 4, op. cit., n. 79.
\textsuperscript{101} Interview 11, criminal justice professional, 19 November 2019.
\textsuperscript{102} Interview 7, op. cit., n. 91.
It is unfortunately part of the landscape upon which serious sexual offences are looked through … People are very, very willing to believe if you go for a drink with somebody … if you are being flirtatious with somebody, then inevitably of course you would be happy to go on and have sex.

The above statements reflect the ongoing challenge presented by ‘rape myths’ – that is, ‘prescriptive or descriptive beliefs about rape … that serve to deny, downplay or justify sexual violence’. Though the extent of the acceptance of rape myths within society and their impact on jury decision making has been debated, extensive mock jury research has illuminated the way in which factors such as evidence of force and/or resistance during the encounter, as well as wider circumstantial factors, such as location, alcohol intake, and whether there was previous sexual contact or flirtation between the parties, enter into jury deliberations around the consensual nature of an encounter.

The existence of and reliance upon rape myths contribute to what Gavey has described as the ‘cultural scaffolding’ of rape, as they reframe experiences of sexual violation as ‘just sex’. Such a framing can also be facilitated by seduction scripts that normalize male persistence in the face of what is problematically believed to be ‘token’ female resistance. As one participant explained in relation to the different states of mind covered by consent (from actual desire on the one hand to reluctant acquiescence on the other), ‘there is a thing about what is normal sex and what our young people are learning about sex … “She says no but she really means yes” … It’s just so much more complicated’. Indeed, while it has been suggested that consent may be inferred from behaviour that falls within accepted social conventions around sex, research has challenged the existence of ‘shared’ conventions, with some scholars arguing that men and women often adopt different perspectives in the context of sexual interactions.

Within this broader social and cultural context, defence counsel can use ‘everyday’ behaviour as implied consent, or argue that any verbal resistance was not strong enough, to suggest that the complainant did consent or, if this cannot be established, that the defendant reasonably believed that there was consent. A key finding from this study, however, was that the

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103 Interview 11, op. cit., n. 101.
104 H. Gerger et al., 'The Acceptance of Modern Myths about Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggressive Behaviour 422, at 423.
107 Gavey, op. cit., n. 72.
109 Interview 6, op. cit., n. 81.
112 See Burgin and Flynn, op. cit., n. 7.
reasonable belief threshold does not explicitly feature in arguments presented at trial. As one participant explained, it would be ‘tactically crazy’ for the defence to say to the jury “‘Listen, I accept that she was not consenting, but my client thought she was consenting.’ That has never happened, because you’re immediately cutting off … the possible argument that actual consent was present’. The key question at trial then becomes: ‘[D]id the complainant behave in a way that people would behave if they were sexually attracted to each other, interested in sex with each other?’ In this respect, it was noted that the prosecution are ‘constantly on the back foot … constantly having to justify the complainant’s behaviour’. Despite the lack of explicit attention to this element, it was noted that the judge will explain it to the jury when summing up and so the defence may present their case in such a way ‘as to even subconsciously in the jury’s mind suggest either yes she consented or she might’ve acted in a way that he believed she consented’.

All of these factors contribute to the minimization of what occurred and, in light of the severity attached to the crime of rape, participants in this study spoke of a reluctance, on the part of the jury, to convict the defendant:

[I]t’s still one word against another … when you put that [to] a jury and they have to consider reasonable belief and what is reasonable and by whose standard is that reasonable, and for a jury I think they are slightly more averse to … finding people guilty.

Rather than appearing that he forced himself on her, they’re focused on the, well, actually all those things before [drinking together and going back to someone’s house], and also looking at him and seeing him really well dressed, and a young fellow, and the rest of his life ahead of him.

Critiques of the way in which a complainant’s behaviour is put on trial are often met with calls to place more responsibility on the defendant to gain affirmative consent. However, one participant in this study suggested that the jury would not apply provisions exploring steps taken by a defendant to ascertain consent because ‘the law has to reflect society … [O]nce the law stops being real, it’s of no value whatsoever.’

While some participants were sceptical about the application and enforcement of such laws, others were encouraged by the potential educative value. As explained by one participant, changes to the law ‘are not always about enforcement … It’s not that you want to have a massive upsurge in criminal cases … you want to teach people or instruct people that actually this is not acceptable

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113 Interview 14, sexual violence support professional, 27 November 2019; Interview 8, criminal justice professional, 12 November 2019.
114 Interview 9, criminal justice professional, 14 November 2019.
115 Interview 11, op. cit., n. 101.
116 Interview 15, criminal justice professional, 6 December 2019.
117 Interview 16, op. cit., n. 93.
118 Interview 12, criminal justice professional, 20 November 2019.
119 Interview 4, op. cit., n. 79.
120 Interview 16, op. cit., n. 93.
and this is.’ In this regard, affirmative approaches were described as more ‘trauma informed’, and it was suggested that they might help to ‘get away from this idea that if a person – I suppose particularly a woman – is submissive, then that therefore is an indicator of consent to a man when obviously it shouldn’t be’. The emphasis on the educative value of affirmative consent resonates with scholarship on the expressive power of the law and the law as a tool of social change.

Yet, any promise of such change may be undone by a lack of general awareness as to the specific legal elements of rape and consent. Indeed, one participant in this study noted that rape is commonly referred to as ‘forced sex’ in Northern Ireland, and another explained that ‘this issue of reasonable belief [in consent] – the only people who know about that are lawyers’. In this regard, those from the sexual violence support sector placed more emphasis on the law’s expressive value, whereas criminal justice professionals were more sceptical of the extent to which the law reaches beyond the courtroom. Building on this, the following section engages with issues of understanding, or a lack thereof, in terms of legal provisions on consent.

4.3 Consent confusion

As noted earlier, it was open to Gillen to redefine consent, drawing on models of consent that exist elsewhere, such as affirmative models that require consent to be some sort of performative act; however, these models were rejected due to the potential for confusion. Instead, Gillen sought to reword an existing provision, the ‘reasonable belief’ provision, so that when determining whether a defendant’s belief in the complainant’s consent was reasonably held, consideration should be given to the defendant’s failure to take steps to ascertain consent. The rationale behind this recommendation was to shift the focus onto the actions of the defendant, though it was explained that a defendant’s failure to take steps remains a consideration only and that a failure to do so does not necessarily suggest liability. Many participants welcomed this recommendation, with one describing it as ‘brilliant’ and more ‘survivor or victim led’. This participant went on to explain: ‘If you’re a juror sitting there and what you’re asked for is “Where did they fail?”’, you’re looking for negatives on the part of the perpetrator.’ The potential of this provision to refocus attention on the inactions of the perpetrator, as opposed to the actions or inactions of the complainant, came through in several interviews:

[I]t would at least focus on what he didn’t do. So he didn’t or he could’ve asked her, he didn’t take into account whether she was drunk, he didn’t take into account whether

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121 Interview 5, op. cit., n. 92.
122 Interviewee 1, sexual violence support professional, 4 October 2019.
123 Interview 15, op. cit., n. 116.
125 Interview 10, sexual violence support professional, 18 November 2019.
126 Interview 16, op. cit., n. 93.
128 Id., p. 370.
129 Interview 2, community stakeholder, 4 October 2019.
130 Id.
he’d only just met this girl and she’d given no indication that she actually wanted to have sex with him on the first night. 131

If somebody is putting an obligation on a victim to consent or say no, which is much more scary actually than asking, there should be the same expectation on both parties. I think even just for where the blame lies and the questioning lies, it would be fantastic. 132

It was also noted that the change in wording would help to identify aspects of an interaction where there ‘should have been an alarm bell that you shouldn’t have went further even if she had said she was up for having sex earlier.’ 133

However, scepticism around the practical impact of the proposed provision was also evident, with one participant noting that they could not ‘imagine this being implemented soon because it isn’t a victim-led system, it’s a defendant-led system.’ 134 Further to this, even though Gillen sought to avoid confusion, findings from this study indicate that the attempt to shift attention to the defendant, by giving the ‘steps’ provision more prominence within considerations of whether a crime has occurred, will nonetheless lead to confusion due to the absence of any further specification as to what that provision entails. As noted by one participant,

[i]f I was sitting on the jury of 12 and going, ‘Right OK, what did he do to ensure that she was OK? Well, he checked, he asked. OK. So, do people ask on all occasions? No. Right, OK. Does that mean he’s guilty of rape? Not necessarily.’ 135

It was further noted that, due to this lack of understanding as to what might amount to a step, or when a defendant would be expected to take steps to ascertain consent, any prosecution questioning of the defendant in relation to this issue would ultimately be the subject of mockery by the defence:

‘[T]hink about this from your own experience – this is real life. Do men say to women ‘May I kiss you on the lips? May I now kiss you behind the neck?’ . . . Is that real life, members of the jury? Is that how human relations actually are?’ 136

In this respect, there could be unintended consequences of this change in wording, with the defence using it to create a caricature of consent as an ‘attack on intimacy.’ 137

131 Interview 15, op. cit., n. 116.
132 Interview 14, op. cit., n. 113.
133 Interview 4, op. cit., n. 79.
134 Interview 14, op. cit., n. 113.
135 Interview 4, op. cit., n. 79.
136 Interview 16, op. cit., n. 93.
While sexual communication is complex, negative perceptions of the ‘steps to ascertain consent’ provision speak to a broader lack of understanding in relation to how it will operate in concrete cases. For example, in the present study, several participants assumed that a focus on steps taken by the defendant was going down the route of requiring a signed contract:

‘Would you like to go through this list and make sure you’ve ticked all these boxes before you come near me?’

If it’s [the steps requirement] written, then it’s how do you do this in a loving intimate environment?

You could be creating a culture where it’s felt that almost that he’s getting a signature.

I know it comes out in the press ‘Oh, we’re going to have to have written contract every time somebody has sex’ [but] if the outcome of that means men end up with lots of pieces of paper and no one ends up being raped, wouldn’t that be a wonderful thing?

Yet, there can be various interpretations of the ‘steps’ requirement. In New South Wales, for example, in the 2017 case of R v. Lazarus, Justice Bellew stated:

[A] ‘step’ … must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. A positive act … extends to include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.

This position is at the opposite end of the spectrum from requiring a signed contract and was heavily criticized for interpreting a step as ‘nothing more than a subjective state of mind’. The New South Wales Law Reform Commission subsequently recommended reforming the provision so that fact finders should consider what the defendant said or did to ascertain whether or not

138 K. L. Harris, ‘Yes Means Yes and No Means No, but Both These Mantras Need to Go: Communication Myths in Consent Education and Anti-Rape Activism’ (2018) 46 J. of Applied Communication Research 155.
140 Interview 5, op. cit., n. 92.
141 Interview 4, op. cit., n. 79.
142 Interview 7, op. cit., n. 91.
143 Interview 11, op. cit., n. 101.
144 R v. Lazarus, op. cit. [2017], n. 3, para. 147.
the complainant consented. The ‘steps’ requirement was also subject to discussion during a review of the law in the Republic of Ireland, with the Law Reform Commission taking the view that “steps” must mean physical or verbal communication to ascertain consent.

In this respect, Gillen’s approach shows some potential to achieve its stated aim – shifting the focus to the defendant and requiring the jury to make an additional factual determination regarding the defendant’s failure to take steps; however, without any guidance around what act will constitute a step or what the jury should do once they have considered it, his approach adds a degree of uncertainty. Such uncertainty may result in a ‘gap’ between the law on the books and the law in action. As noted by one participant, ‘it doesn’t matter how you word this definition [of consent] … [J]uries will do whatever they think should be the right result.’ In the context of reforms to consent in New South Wales, Quilter has conceptualized this as a process of filling in gaps with ‘common knowledges’. Here, she is referring to the work of Valverde, who explains that “common knowledge is not some kind of average of what people know. It is not descriptive but imperative; it is the knowledge we all ought to have.” Yet, as discussed earlier, rather than there being any ‘shared’ knowledge of appropriate sociosexual behaviour, there are a range of views, many of which diverge sharply from the aspirational norms underlying reforms to consent laws. This divergence can then be exploited by legal actors, predominately defence lawyers, who often perpetuate rape myths in an attempt to undermine the credibility of the victim and attach ‘reasonableness’ to the actions of the defendant.

In light of this, the following section engages with the notion of communicative responsibility as a means of thinking through how we might develop the ‘steps’ provision further, or at least reflect on its place within determinations of whether a sexual offence has occurred, so as to avoid ridicule or mockery.

5 SEXUAL COMMUNICATION AND COMMUNICATIVE RESPONSIBILITY

The interview data suggests that, within Northern Ireland, there is societal ambivalence around sex, consent, and rape, with a lack of awareness of the legal requirements, such as the need to determine whether the defendant’s belief in consent was reasonable, as well as uncertainty around how Gillen’s recommendation on a defendant’s failure to take steps to ascertain consent would be applied in practice. As such, the core controversies that arise in respect of the current formulation of the reasonable belief threshold are likely to endure under the proposed reformulation. While it might be useful to work towards a definition of, or further guidance around, the ‘steps to ascertain

148 See quotes, op. cit., ns 131–133.
149 Quilter, op. cit., n. 16, p. 13.
150 Interview 16, op. cit., n. 93.
151 Quilter, op. cit., n. 16, p. 13.
consent’ provision, participants in this study were divided on how prescriptive the law can and should be. For instance, while some felt that it ‘should be clear what failure [to take steps] means – failure to ask, failure to show, failure to …’, others felt that ‘you’d nearly be telling your jury what to say’. Further to this, concern was expressed that ‘when we go into a lot of detail, we risk actually alienating our jury’, with one participant stating that ‘the amount of information that an unsuspecting jury is [already] expected to assimilate and understand … is utterly unrealistic’.

As such, this section does not seek to delineate the definitional boundaries of the ‘steps to ascertain consent’ provision. Rather, its purpose is to try to make sense of the enduring challenges in this area of law and human interaction. Indeed, while the reasonable belief threshold was originally introduced to ‘more fairly distribute responsibility for communicating sexual desire between victim and assailant’, and Gillen’s recommendation seeks to strengthen this threshold by focusing attention on the defendant’s actions or inactions in ascertaining consent, these aspirations are impeded by divergent expectations around when communication is appropriate, or required, during a sexual interaction, and the form that it should take.

In this respect, the concept of communicative responsibility provides some interesting insights that may inform how we approach any expectation of a defendant taking steps to ascertain consent within the context of sexual offences. The theory of communicative responsibility posits that ‘people approach a communicative event with the implicit belief that their primary goal is to establish a state of shared meaning or understanding between themselves and that each communicator bears a measure of responsibility for bringing about that state’. Aune and colleagues explain that ‘a communicator’s burden of communicative responsibility is neither uniform across communicative situations nor is it necessarily symmetrically distributed among participants across communicative situations’. Further to this, they claim that our judgements of each other’s communicative responsibility influence the extent to which we engage in the use of conversational inference and implicature. It has been suggested that communicative responsibility is more symmetrical in situations characterized by perceptions of significant common ground:

[T]he more cultural, social, personal, general, and contextual/situational knowledge communicators believe they share, the more they will assume that each is capable of contributing to their communicative goals by referring to their common ground to make appropriate implicatures and inferences.

Where there is less shared knowledge – for instance, in situations of significant age difference, where one party is unfamiliar with their surroundings, or where one party is more

153 Interview 2, op. cit., n. 129.
154 Interview 4, op. cit., n. 79.
155 Id.
156 Interview 16, op. cit., n. 93.
157 Munro, op. cit., n. 31, p. 419.
158 See quotes, op. cit., ns 83, 92, 94, 97, 120, 132, 135, 136.
159 Aune et al., op. cit., n. 24, p. 359.
160 Id., p. 360, emphasis in original.
161 Id.
162 Id., p. 362.
intoxicated – personal communicative responsibility increases, and parties engage in less
implicature and make fewer inferences.

This argument is embedded within a body of work examining the challenges faced by commu-
nicators in a communicative context, which influence how individuals engage with one another
to achieve the goals of communication. According to Clark, for instance, communication is con-
ceptualized as a joint activity that requires the collaboration and coordination of two or more
parties to achieve a primary goal. 163 Fussell and Krauss have shown how communicators adjust
their communication style to meet the needs and abilities of specific receivers. 164 These schol-
ars emphasize the need for communicators to be responsive and cooperative in recognizing and
meeting the demands of a communicative situation. If we apply this to the context of sexual rela-
tions, we can see certain similarities with legal theories on ‘ideal’ sex, for example, such as the
description of the interaction as a joint activity and the emphasis on cooperation. 165 The work
of Aune and colleagues deepens the analysis by developing a theory that seeks to understand
how communicative responsibility is distributed among communicators and how individuals
can recognize and satisfy that responsibility. In this way, the notion of communicative respon-
sibility resonates with the discussion earlier in the article around communicative consent being
dependent on epistemic responsibility – that is, the responsibility of sexual partners to know what
the other person wants and does not want from sex. 166 This ideal of epistemic responsibility also
came through in the interviews, with one participant explaining that ‘if somebody is putting an
obligation on a victim to consent or say no … there should be the same expectation on both
parties’. 167

However, the challenge is that sexual relations and sexual expectations are shaped by gendered
norms, particularly in a heterosexual context. As one participant explained, we are dealing with
‘social problems in terms of attitudes to sex, particularly male attitudes to sex’, 168 and another
participant suggested that ‘sexual norms are changing to make violent sex/rape normal’. 169 These
views can be situated within an extensive literature that indicates that men and women adopt dif-
ferent perspectives in the context of sexual interaction. 170 It can therefore be difficult to achieve
a state of shared meaning or understanding from which to reliably interpret behaviour. While
Aune and colleagues explain that ‘a communicator’s burden’ may not be ‘symmetrically dis-
tributed’ among participants, as noted earlier, we know that in the context of a rape allegation, where any
shared understanding of the event is lacking, disproportionate emphasis is placed on the com-
plainant and there is a failure to recognize the communicative responsibility that also falls on the
alleged perpetrator.

Drawing on the empirical data discussed earlier, two core reasons can be advanced for this
uneven distribution of responsibility. First, perceptions of ‘ideal’ victimhood that require verbal or

164 S. R. Fussell and R. M. Krauss 'Coordination of Knowledge in Communication: Effects of Speakers’ Assumptions about
165 Gardner refers to good sex as a ‘team activity’: Gardner, op. cit., n. 80, p. 54.
166 See Monaghan and Mason, op. cit., n. 37; Pineau, op. cit., n. 35.
167 Interview 14, op. cit., n. 113.
168 Interview 9, op. cit., n. 114.
169 Interview 6, op. cit., n. 81.
170 See for example Lindgren et al., op. cit., n. 111.
physical resistance create unrealistic societal expectations in relation to how a rape complainant should react during the alleged incident.\textsuperscript{171} The subsequent victim blaming that is often experienced by complainants who deviate from this expected behaviour can be linked to the theory of communicative responsibility, according to which ‘persons who do not behave in a manner consistent with perceived levels of communicative responsibility are judged more harshly than those who do’.\textsuperscript{172} Thus, a hierarchy of victimhood emerges. Second, there is a tendency to excuse, rather than condemn, an alleged perpetrator for assuming a shared understanding and for failing to check in during a sexual encounter due to sex scripts that position women as sexual gatekeepers.\textsuperscript{173} Such scripts lower societal expectations of male communicative responsibility during sexual encounters, which is reinforced by the perception that asking for consent is not reflective of ‘how things develop naturally between people’.\textsuperscript{174} However, as others have argued, the cost of holding the defendant to a higher standard of responsibility to ensure consent (in an intimate context, where this can be easily discharged) is minor compared to the cost to the complainant’s sexual autonomy and bodily integrity if sexual activity were to occur in the absence of consent.\textsuperscript{175}

While spontaneity can of course be a feature of healthy sexual relations, an interesting insight from the interviews conducted in this study was that there may well be features of an encounter that, as one participant noted, trigger ‘alarm bells’.\textsuperscript{176} These may include, for example, when someone becomes passive during a sexual encounter, they push the other person’s hand away, they become quiet or distant, or they are drunk to the point of slouching or falling over. In these example circumstances, the communicative responsibility of the person initiating the sexual activity should be heightened and the extent to which reliance on inference and implicature is acceptable should be reduced. Within the context of a rape trial, it is hoped that the prosecution would highlight these circumstances when arguing that there was no consent or that the defendant did not reasonably believe that there was consent.

In moving to consider how attending to communicative responsibility might be encouraged within this context, it is useful to explore the potential of judicial directions to the jury. For instance, the Crown Court Compendium provides the following model directions around reasonable belief in consent:

But if you decide that D did genuinely believe or may have believed that W had consented, you must then decide question (2): whether D’s belief in W’s consent was reasonable. To answer this, you must decide whether an ordinary reasonable person, in the same circumstances as D, would have believed W was consenting. You must consider all the evidence presented to you. This includes looking at any steps D took to find out whether W was consenting or not.\textsuperscript{177}

\begin{itemize}
\item \textsuperscript{171} See quotes, op. cit., ns 101–103.
\item \textsuperscript{172} Aune et al., op. cit., n. 24, p. 375.
\item \textsuperscript{173} Torenz, op. cit., n. 14.
\item \textsuperscript{174} Interview 16, op. cit., n. 93.
\item \textsuperscript{175} Munro, op. cit., n. 33, p. 945; A. Ashworth, Principles of Criminal Law (2019) 354–355.
\item \textsuperscript{176} Interview 4, op. cit., n. 79.
\item \textsuperscript{177} Judicial College, op. cit., n. 51, ch. 20, p. 19.
\end{itemize}
The notion of communicative responsibility could be embedded within these directions by adding the following:

The prosecution have suggested that the complainant was X/the situation was X, and the fact that the defendant did not say or do anything at this point amounts to a failure to ascertain whether the complainant consented. This will be important to your consideration of whether the defendant reasonably believed that the complainant consented.

Drawing attention to such instances responds to the desire, expressed by some interviewees, to have a firmer understanding of what might amount to an ‘unreasonable’ belief in consent and utilizes the language of ‘failure’ as proposed by Gillen.178 The work of Harris is instructive here. She suggests that we need to pay attention to ‘metacommunications’ – that is, how people ‘account for possible differences in their assumptions, perceptions, and interaction styles’.179 To use her example, she explains that while someone saying ‘I’m not really sure’ could be considered ambiguous, the decision about what to do next is not, and this is where the focus should be.180 The extent to which fact finders are attentive to these different understandings and behaviours depends on whose version of events they find the most credible. For example, if the defendant argues that consent was clearly present and there was no ambiguity, and this is accepted by the fact finders, then they may be reluctant to conduct a close examination of metacommunications. If, on the other hand, the complainant argues that there was no consent and that there were verbal and/or physical cues, even subtle changes in body language, and this version is found to be credible, then fact finders may be more willing to explore metacommunications or the lack thereof.

Nonetheless, the notion of communicative responsibility has the potential to deepen our understanding of sexual communication on both a theoretical and a practical level. First, it asks us to consider the extent to which there is shared understanding between sexual actors; second, it helps us to acknowledge the joint responsibility of sexual actors to achieve that understanding; third, it draws attention to the different factors that feed into acceptable and unacceptable levels of implication; fourth, it provides a new lens for understanding victim-blaming attitudes when individual communicative behaviour does not match societal expectations; fifth, it illuminates situations where communicative responsibility is heightened and where a failure to communicate should be viewed as problematic or ‘unreasonable’. In this way, it can be used to uncouple the ‘steps to ascertain consent’ provision from narratives that present communication as the sole responsibility of the complainant or as out of line with ‘how things develop naturally’,181 and instead normalize active and responsive sexual relations that require communication, in its many forms.

6 | CONCLUSION

 Debates around the way in which consent should be legally formulated in the context of rape and sexual offence legislation, while not new, continue to perplex academics and practitioners

178 Interview 12, op. cit., n. 118; Interview 2, op. cit., n. 129; Interview 15, op. cit., n. 116.


180 Id., p. 162.

181 Interview 16, op. cit., n. 93.
alike. Within this context, this article has focused on the renewed efforts that have been directed towards reforming consent, specifically the adoption of affirmative or communicative conceptions of consent, where consent either has to be expressed by the complainant or actively sought by the defendant. While such models form part of what Burgin and Flynn have described as ‘careful and considered feminist intervention’ into rape law, others fear that some of these approaches reflect ‘reactionary, unrealistic and unfair proposals’. Drawing on empirical research from Northern Ireland, in the context of the Gillen Review, this article has contributed to these debates by providing a unique and timely insight into the views and expectations of professional stakeholders on proposed reforms to sexual consent and, in particular, the recommendation that the reasonable belief threshold should be amended so that the jury consider a defendant’s failure to take steps to ascertain whether the complainant consented.

The themes identified from the interviews offer insights into the ways in which sexual consent is conceptualized, interpreted, and complicated within social and legal settings and the continuing uncertainty around the role of communication in sexual encounters. For some, sexual consent is deeply intimate yet ‘obvious’ in nature, resulting in their opposition to legal frameworks that attempt to capture explicit consent or place responsibility on sexual partners to demonstrate how they ascertained consent. However, there was also an acknowledgment that what might seem obvious to one party in a sexual encounter is not necessarily obvious to the other, and that third-party assessments of the legality of a sexual encounter are often informed by problematic understandings of who should be considered an ‘ideal’ victim or offender. Within this context, Gillen’s proposal has appeal due to its potential to subtly redistribute responsibility, by focusing on the inactions of the defendant. Yet, at the same time, interviewees expressed concern that the provision would be difficult to apply due to a lack of understanding as to what it means, opening up the potential for the defence to exaggerate the provision. In this way, the reform may become ‘unreadable’, as it is ‘circumvented and co-opted … to the detriment of the female rape complainant’. Thus, as argued in this article, it is likely that the current challenges associated with the reasonable belief threshold will similarly manifest under the proposed legal reform.

In order to address this challenge, this article has drawn on the notion of communicative responsibility and argued that this concept provides the foundation for recognizing and embracing the complexity of human interactions. Communicative responsibility can be used to confront the societal ambivalence around rape and consent by providing a new lens for understanding society’s misconceptions around sex and sexual violation as well as rethinking responsibility, all of which go some way towards addressing any confusion related to when more explicit communication should be expected within the context of a sexual encounter. While communicative responsibility centres communication, it does so in a way that avoids the pitfalls of some of the narrow conceptions of affirmative or communicative consent. As noted by Harris, ‘instead of resting on one party’s acceptance or refusal of an advance, appropriate sexual encounters are defined in the space between the two partners, in their attempts or failure to negotiate a shared meaning’. However,
it is not suggested that the account of communicative responsibility, and its application to sexual relations, offered here will resolve all of the challenges associated with determining whether or not a sexual violation has occurred. Rather, it is argued that communicative responsibility can provide a means to think through how we might better operationalize the ‘steps to ascertain consent’ provision and solidify its place within the communicative consent framework.

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